



**County Government of Vihiga v Kevego (Miscellaneous Application
E010 of 2024) [2025] KEELRC 1722 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1722 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
MISCELLANEOUS APPLICATION E010 OF 2024
DN NDERITU, J
JUNE 12, 2025**

BETWEEN
THE COUNTY GOVERNMENT OF VIHIGA APPLICANT
AND
ABIGAELE KAZZY KEVEGO RESPONDENT

RULING

I. Introduction.

1. In a judgement delivered on 20th July, 2023 in Vihiga ELR Chief Magistrate’s Court Cause No. 4 of 2021, the respondent was awarded a total of Kshs1,439,060/= in compensation, a certificate of service, costs and interest against the applicant.
2. In a notice of motion dated 18th December, 2024 (the application), the applicant is seeking for orders that –
 - i. The Honourable court be pleased to grant the applicant leave to file the memorandum of appeal out of time against the judgement in Vihiga ELR Chief Magistrate’s Court Cause No. 4 of 2021 on 20th July, 2023 by Hon. R.M. Ndombi.
 - ii. The costs of this application be provided for.
3. The application is expressed to be founded on Articles 50(1) and 159(2)(d) of *the Constitution*, Section 79G of the *Civil Procedure Act*, and Order 50, Rule 6 of the Civil Procedure Rules. It is based on the grounds on the face of it.
4. The application is supported with the affidavit sworn by James Mukabi, the County Solicitor of the applicant, on 17th December, 2024 with several annexures thereto.



5. On 19th March, 2025 when the matter came up in court for directions, the court directed that the application be canvassed by way of written submissions.
6. On 2nd April, 2025 the respondent filed a notice of preliminary objection (PO) on the following grounds that –
 - a. The instant Miscellaneous application herein is Res judicata as the matter before this court had already been dismissed in Kakamega ELRC Miscellaneous No. E007 of 2024 where the application was dismissed for want of prosecution by Hon. Mr. Justice David Nderitu.
 - b. The entire application is brought in bad faith, is frivolous, vexatious, and an abuse of the court process thus should be struck out with costs to the respondent.
7. On 8th May, 2025, the respondent filed a replying affidavit sworn by herself on 11th March, 2025.
8. No submissions were filed by either side and the court shall determine the application based on the materials filed in court.

II. Evidence

9. In the supporting affidavit by the applicant, it is deponed that the lower trial court (Hon. R.M. Ndombi) in Vihiga CM ELRC No. 4 of 2021 delivered a judgment (JO-1) against the applicant in favour of the respondent.
10. It is stated that the applicant was not served with a notice for delivery of the judgment by the respondent or the court.
11. It is deponed that the applicant only became aware of the judgement upon being served with a mention notice on 11th October, 2024 for taxation of costs on 7th November, 2024. It is deponed that at that point the applicant requested for typed proceedings which were supplied on 1st November, 2024.
12. It is further deponed that the delay in filing the memorandum of appeal was occasioned by the lack of knowledge that a judgment had been delivered.
13. It is deponed further that when the matter had come up for directions on 16th January, 2023 before the lower trial court, the judgement date had been fixed for 16th March, 2023 as per the proceedings(JO-2), but on the said date the judgement was not ready.
14. It is deponed that the judgment sought to be appealed against was delivered without notice on 20th July, 2023 and the applicant is aggrieved by the same and wishes to exercise its right of appeal as expressed in the annexed draft memorandum of appeal (JO-4).
15. It is deponed that the appeal raises substantial and weighty issues and the applicant is apprehensive that the respondent shall commence execution to enforce the judgment and the consequential orders arising therefrom.
16. It is deponed that on 7th November, 2024 when the matter came up for taxation, the respondent was directed to serve upon the applicant the bill of costs and the matter was slated for mention on 4th February, 2025.
17. It is deponed that should the respondent execute the decree following the judgment and the taxed costs, the applicant stands to suffer irreparably as there is a likelihood of public funds being used to pay the respondent before the appeal is heard and determined and the respondent may not be able to refund the same should the appeal succeed.



18. It is deponed that the respondent shall not suffer any prejudice as the applicant is capable of satisfying the decree should the appeal ultimately fail and, in any event, it is the applicant that stands to suffer prejudice as it shall be burdened as it has no budget to satisfy the decree.
19. In the PO and the replying affidavit, the respondent asserts that the present application is res judicata and an abuse of the court process as the matter before the court was dismissed in Kakamega ELRC Miscellaneous No. E007 of 2024 for want of prosecution and ripe for dismissal.
20. The respondent deponed that the application is shrouded in falsehoods as the applicant actively participated in the taxation proceedings evidencing its awareness of the delivery of the judgement.
21. On whether the applicant was aware that judgment was to be delivered, it is deponed that the applicant received notification from the court on taxation and the claim of having not been served with the notice for judgment is meant to mislead the court.
22. It is deponed that the application was filed inordinately as Section 79G of the [Civil Procedure Act](#) provides that an appeal ought to have been filed within 30 days of the judgment. It is stated that the applicant waited for 16 months from 20th July, 2023 to 18th December, 2024 to file the application.
23. It is deponed that the application is only a ploy to delay execution and manipulate the court into allowing an application that is bad in law. The court is urged to prevent abuse of the court process and dismiss the application with costs.

III. Issues For Determination

24. The court has carefully read the application and the affidavit in support, the PO, and the replying affidavit. The following two issues commend themselves to the court for determination Whether the application is res judicata And, Whether the applicant is deserving of an extension of time to lodge an appeal out of time as prayed.

IV. Res Judicata

25. The doctrine of res judicata is embodied in Section 7 of the [Civil Procedure Act](#) in the following terms –
 - “7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.” (Emphasis added)
26. The ingredients of res judicata are, firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should have been between the same parties, or parties under whom they or any of them claim, litigating under the same title and, thirdly, that the court or tribunal before which the former suit was litigated was competent and determined the matter with finality.
27. The applicant herein had filed ELRC Miscellaneous No. E007 of 2024 which was dismissed on 3rd December, 2024 for want of prosecution. The applicant then filed the instant application which is identical to the one dismissed.



28. It is not in dispute that the parties and issues raised in the two applications are identical. It is also not in dispute that the former application was dismissed for want of prosecution.
29. The court dismissed the former application for want of prosecution and thus did not delve into the merits of the application. The applicant had the option to either seek to reinstate the application or file the same afresh subject to limitation of time and abuse of court process. The court finds and holds that the application before the court is not res judicata as the issues before the court in Kakamega ELRC Miscellaneous No. E007 of 2024 were not heard and determined on merits. The door remained open for the applicant to apply to reinstate the dismissed application or to lodge the same afresh.

V. Leave To File Appeal Out Of Time.

30. This limb of the application is based on Section 79G of the *Civil Procedure Act* which provides that –

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time (Emphasis added)

31. Rules 12 & 18 of Employment and Labour Relations Court (Procedure) Rules, 2024 (The Rules) mirror Section 79G of the Civil Procedure Rules providing that –

12 (1) Where a written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified under that written law.
(2) Where an appeal is from a magistrate's court or where no period of appeal is specified in the written law referred to in sub-rule (1), the appeal shall be filed within thirty days from the date the decision is delivered.

PARA 18.

The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal. (Emphasis added)

32. The Supreme Court in *Nicholas Kiptoo Korir Salat v IEBC & 7 others* (2014) eKLR laid down the principles that a court should consider in exercising the discretion to extend the time for filing an appeal –

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case-by-case basis.
4. Whether there is a reasonable reason for the delay.
5. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay, and



7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
33. The applicant argues that it was not notified when the judgment was delivered as the last directions issued in court on 16th January, 2023 were that the judgment would be delivered on 16th March, 2023. The applicant's position is that on 16th March, 2023 the judgement was not ready and no subsequent judgement notice was served upon it. The applicant stated that it became aware that the judgment had been delivered on 20th July, 2023 after it was served with a notice of taxation from the court on 11th October, 2024.
34. The respondent argues that the participation of the applicant in the taxation proceedings estopped the applicant from asserting that it was not aware of the delivery of the judgment.
35. The court has perused the proceedings of the lower court annexed to the application and noted that indeed the delivery of the judgment had been slated for 16th March, 2023. The respondent has not denied that no notice of delivery of the judgement was served and that the applicant was aware of 20th July, 2023 as the date for delivery of judgment.
36. The judgment in the lower trial court was delivered on 20th July, 2023 and the present application was filed on 18th December, 2024. The applicant thus had up to about 20th August, 2023 to file an appeal as of right without leave. The present application was filed approximately 16 months after the judgment. The applicant has explained that the delay in filing the appeal was occasioned by the fact that it was not aware that the judgment had been delivered. The applicant only became aware of the judgment after it received a notice for taxation of costs.
37. The applicant has stated that upon receiving the notice for taxation it immediately requested for a copy of typed proceedings from the lower court and the impugned judgment. The court finds and holds that the applicant was not aware of the judgment as it was notified of the same. The respondent has not adduced evidence to show that the applicant was served with a notice of the delivery of judgment. The court finds and holds that in the circumstances the delay in filing the appeal is excusable as the same has been reasonably explained.
38. The court has perused the draft memorandum of appeal and finds and holds that, prima facie, the same raises arguable and or triable issues.
39. As to the prejudice that the respondent may suffer if leave is granted to the applicant to file an appeal out of time, the respondent will certainly have an opportunity to respond to the appeal once filed and stay orders do not extinguish a party's entitlements to a judgment, but rather delays the enjoyment to a future time. Delay is not denial.

VI. Order

40. The court orders that –
- i. The application dated 18th December, 2024 is merited and the same is hereby allowed.
 - ii. The applicant shall file the memorandum of appeal and record of appeal within 60 days of this ruling.
 - iii. The costs of this application shall abide with the outcome of the appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 12TH DAY OF JUNE, 2025.



DAVID NDERITU
JUDGE

